UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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The State of New York, Alexander B. Grannis, as Commissioner of the New York State Department of Environmental Conservation, and the New York State Department of Environmental Conservation,

Plaintiffs,

08-CV-2503 (CPS)(RLM)

United Boatmen of New York, Inc., New York Fishing Tackle Trade Association, Inc., and the Fishermen's Conservation Association,

Intervenor-Plaintiffs

- against -

MEMORANDUM OPINION AND ORDER

Gary Locke, in his official capacity as Secretary of the United States Department of Commerce, the United States Department of Commerce, Jane Lubchenco, in her official capacity as Under Secretary of Commerce and as Administrator for the National Oceanic and Atmospheric Administration, James W. Balsiger, in his official capacity as Acting Assistant Administrator for the National Marine Fisheries Service, and the National Marine Fisheries Service,

Defendants.

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SIFTON, Senior Judge.

Plaintiffs the State of New York, Alexander B. Grannis as Commissioner of the New York State Department of Environmental Conservation, and the New York State Department of Environmental Conservation (together, "plaintiffs"), along with intervenor-plaintiffs United Boatmen of New York, Inc. ("UBNY"), New York

Fishing Tackle Trade Association, Inc. ("NYFTTA"), and the Fishermen's Conservation Association ("FCA") (together, "intervenor-plaintiffs"), bring this action against defendants Gary Locke, in his official capacity as Secretary of the United States Department of Commerce, the United States Department of Commerce, Jane Lubchenco, in her official capacity as Under Secretary of Commerce and Administrator for the National Oceanic and Atmospheric Administration, the National Oceanic and Atmospheric Administration ("NOAA"), James W. Balsiger, in his official capacity as the Acting Assistant Administrator for the National Marine Fisheries Service ("NMFS") (together, the "federal defendants"),[1] and the Atlantic States Marine Fisheries Commission (the "ASMFC" or "Commission"). Plaintiffs claim that the final management rule for the 2008 recreational summer flounder fishery issued by the Department of Commerce (the "DOC"), through the NMFS, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, as amended in 1996 by the Sustainable Fisheries Act, 16 U.S.C. §§ 1801, *et seq*. (the "MSA"), violates the MSA as well as standards of decision making under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

[1] Plaintiffs originally named Carlos Gutierrez and Conrad C. Lautenbacher, in their former official capacities as Secretary of Commerce and Under Secretary of Commerce and Administrator for the National Oceanic and Atmospheric Administration, respectively, as defendants. Since the commencement of this action, however, Gary Locke replaced Mr. Gutierrez as Secretary of Commerce, and Jane Lubchenco replaced Mr. Lautenbacher as Under Secretary of Commerce and Administrator for the National Oceanic and Atmospheric Administration.

(the "APA"). In addition to these claims, intervenor-plaintiffs claim that that the final management rule for the 2008 recreational summer flounder fishery issued by the ASMFC violates the ASMFC Compact & Rules and Regulations, Pub. L. 77-539 (1942), *as amended by* Pub. L. 81-721 (1950) ("ASMFC Compact"), the Atlantic Coastal Fisheries Cooperative Management Act, Pub. L. 103-206, 16 U.S.C. §§ 5101-5108 (the "ACFCMA"), the ASMFC Interstate Fisheries Management Program Charter (hereinafter "ISFMP Charter," *available at* http://www.asmfc.org (last visited Apr. 7, 2009)), and the APA.

Presently before this Court is intervenor-plaintiffs' motion for reconsideration of my June 30, 2009 order staying these proceedings with regard to defendant ASMFC pending resolution of ASMFC's interlocutory appeal. For the reasons set forth below, intervenor-plaintiff's motion for reconsideration is granted, and upon reconsideration, defendant ASMFC's motion for a stay is denied because I lack jurisdiction over further proceedings against defendant ASMFC pending decision on its appeal.

BACKGROUND

Familiarity with the factual background of this matter is presumed based on the record of proceedings before the undersigned. For a description of the facts of this case, *see State of N.Y. v. Locke*, No. 08-CV-2503, 2009 WL 1194085 (E.D.N.Y. Apr. 30, 2009). What follows is a relevant procedural history.

On April 7, 2009, pursuant to 28 U.S.C. § 1292(b), I granted defendant ASMFC's request for certification of an immediate appeal of my ruling that intervenor-plaintiffs have a private right of action against ASMFC. In my memorandum opinion and order, I further noted that defendant ASMFC was entitled to seek immediate appeal of my decision that it is not entitled to sovereign immunity. Accordingly, on April 16, 2009, defendant ASMFC petitioned the Court of Appeals for the Second Circuit for permission to appeal under § 1292(b). On June 9, 2009, the Court of Appeals granted ASMFC's petition for permission to appeal.

On June 11, 2009, defendant ASMFC filed its notice of interlocutory appeal pursuant to § 1292(b) and the collateral order doctrine. On the same day, it filed a motion to stay the proceedings against it pending resolution of the interlocutory appeal. On June 12, 2009, plaintiff the State of New York moved for summary judgment against the federal defendants, and intervenor-plaintiffs United Boatmen *et al.* moved for summary judgment against all defendants, including ASMFC.

On June 30, 2009, I granted defendant ASMFC's motion to stay the proceedings against it in a decision read from the bench. Intervenor-plaintiff's timely motion for reconsideration of that decision followed on July 14, 2009.

DISCUSSION

I. Standard for Reconsideration

Civil motions for reconsideration in this District are governed by Federal Rule of Civil Procedure 59(e) and Local Civil Rule 6.3. *U.S. v. James*, No. 02 CV 0778, 2007 WL 914242, at *3 (E.D.N.Y. Mar. 21, 2007). While timely motions for reconsideration are permitted under Local Civil Rule 6.3, "[t]he standard for granting such . . . motions is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusions reached by the court." *Shrader v. CSX Transp.*, 70 F.3d 255, 257 (2d. Cir. 1995). Reconsideration is also appropriate if there is an intervening change of controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice. *Doe v. N.Y. City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983); *Casino, LLC v. M/V Royal Empress*, No. 98-CV-2333, 1998 WL 566772, at *1 (E.D.N.Y. Aug. 21, 1998).

Local Civil Rule 6.3 is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been fully considered. *See Caleb & Co. v. E.I. Du Pont De Nemours & Co.*, 624 F.Supp. 747, 748 (S.D.N.Y. 1985). In deciding a Local Rule 6.3 motion, courts will not allow a party

to use the motion as a substitute for an appeal from a final judgment. *See Morser v. A.T. & T. Info. Sys.*, 715 F.Supp. 516, 517 (S.D.N.Y. 1989); *Korwek v. Hunt*, 649 F.Supp. 1547, 1548 (S.D.N.Y. 1986). Accordingly, a party in its motion for reconsideration "may not advance new facts, issues or arguments not previously presented to the court." *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, No. 86-CV-6447, 1989 WL 162315, at *3 (S.D.N.Y. Aug. 4, 1989).

II. Merits of Motion for Reconsideration

A. *Whether Reconsideration Should Be Granted*

Intervenor-plaintiffs argue that reconsideration should be granted because I overlooked controlling decisions and factual matters. Specifically, they argue that reconsideration is warranted because in rendering my decision, I did not provide any analysis of the four factors they allege I was required to consider under *Hilton v. Braunskill*, 481 U.S. 770 (1987), when evaluating ASMFC's motion for a stay pending appeal. As further set forth below, I conclude that an analysis of the *Hilton* factors is not necessary in this case. Nevertheless, I find that reconsideration is warranted on the ground that I overlooked the Second Circuit's decision in *In re World Trade Center Disaster Site Litigation*, 503 F.3d 167, 170 (2d Cir. 2007), as well as other related decisions. Accordingly, I proceed to reconsider ASMFC's motion to stay the proceedings against it pending appeal.

B. *Reconsideration of ASMFC's Motion to Stay*

In general, the filing of an interlocutory appeal does not divest the district court of jurisdiction over issues not addressed by the appeal. *City of N.Y. v. Beretta U.S.A. Corp.*, 234 F.R.D. 46, 50 (E.D.N.Y.) (noting that interlocutory appeals, whether pursued via certification under § 1292 or via the collateral order doctrine, "do not generally divest the district court of jurisdiction over issues not under consideration in the appeal"). However, when an interlocutory appeal based upon the denial of an immunity defense is noticed pursuant to the collateral order doctrine, the notice of appeal may, in fact, divest the district court of jurisdiction over the appealing defendant. Courts having considered this question have uniformly applied the "dual jurisdiction rule" developed in the Fifth Circuit, under which "the filing of an appeal under the collateral order doctrine respecting a right not to be tried divests the district court of jurisdiction to proceed with the trial [against the appealing defendant] unless the district court certifies that the appeal is frivolous[.]" *Beretta*, 234 F.R.D. at 51 (citing, *inter alia*, *U.S. v. Dunbar*, 611 F.2d 985, 987-89 (5th Cir. 1980) and collecting cases). While the Second Circuit has not explicitly adopted the dual jurisdiction rule, it held in the *World Trade Center* litigation that the pursuit of an interlocutory appeal based upon a sovereign immunity defense

deprived the district court of jurisdiction over the appealing defendant pending the appeal. *In re World Trade Ctr.*, 503 F.3d at 169, 171 ("Appellants' notice of appeal . . . on grounds of immunity from suit divested the District Court of jurisdiction to proceed with the litigation.") (citations omitted).

Here, for reasons stated in my prior opinions, defendant ASMFC has a colorable claim to a sovereign immunity defense as an agency created by interstate compact, and I decline to certify its appeal as frivolous.[2] *See N.Y. v. Gutierrez*, No. 08-CV-2503, 2009 WL 605830, at *6 (E.D.N.Y. Mar. 9, 2009) ("interstate compact agencies are, in some cases, entitled to Eleventh Amendment immunity from suit"). Accordingly, pursuant to the dual jurisdiction rule and the Second Circuit's decision in the *World Trade Center* litigation, I conclude that I am without jurisdiction over further proceedings against defendant ASMFC pending resolution of ASMFC's interlocutory appeal. Because the issuance of a stay of the proceedings against ASMFC pending

[2] At times in their papers, intervenor-plaintiffs appear to argue that defendant ASMFC only noticed its appeal of the private right of action issue certified pursuant to 28 U.S.C. § 1292(b), and not the sovereign immunity issue pursuant to the collateral order doctrine. However, ASMFC's submissions to the Second Circuit Court of Appeals make clear that its interlocutory appeal was filed both pursuant to the collateral order doctrine on the sovereign immunity issue, as well as pursuant to 28 U.S.C. § 1292(b) on the right of action issue. *See* ASMFC Civil Appeal Pre-Argument Statement ("Form C"), 2d Cir. No. 09-1594, Part A: Jurisdiction (asserting that appellate jurisdiction exists both by virtue of a certified order as well as a decision "Appealable As of Right"); *Id.* Addendum B (including as one of two questions to be raised on appeal "[w]hether, in the absence of any specific congressional authorization or any consent by the member states, the Eleventh Amendment precludes a private party from maintaining an action against the Atlantic States Marine Fisheries Commission").

appeal would be superfluous, there is no need to consider the *Hilton* factors, and accordingly, on reconsideration, defendant ASMFC's motion to stay is denied for lack of jurisdiction.

CONCLUSION

For the reasons set forth above, intervenor-plaintiffs' motion for reconsideration is granted, and upon reconsideration, defendant ASMFC's motion to stay the proceedings against it is denied for lack of jurisdiction. The Clerk is directed to transmit a copy of the within to the parties and the assigned Magistrate Judge.

SO ORDERED.

Dated: Brooklyn, NY
August 3, 2009

By: /s/ Charles P. Sifton (electronically signed)
United States District Judge